

STATE RECORDS

of South Australia

Managing FOI through Administrative Change

The purpose of this information sheet is to provide general advice to agencies on how to manage FOI applications and responsibilities during an administrative change.

Elections or decisions of the Government of South Australian, such as ministerial portfolio reshuffles, agency/portfolio mergers, or new legislation, can result in 'administrative changes' to South Australian agencies.

An 'administrative change' refers to a change in the responsibilities for the administration of government functions¹. These changes can occur as a result of:

- » a function being transferred from one agency to another
- » a whole agency being transferred from one portfolio to another
- » the permanent abolition of an agency/function within Government
- » the abolition of an agency/function within Government through sale/privatisation
- » a new agency being established, or
- » Government undertaking new functions.

The *Freedom of Information Act 1991* (FOI Act) is largely silent on what happens to FOI applications when an administrative change occurs but does provide legislative instruction regarding defunct agencies (see Section 3 below).

Agencies may need to seek further legal advice from the Crown Solicitor's Office regarding a specific administrative change to a function.

This information sheet should be read in conjunction with the *Managing Records through Administrative Change Guideline*.

1 – A function transfers to another agency

When a function of one agency (the former agency) is to be transferred to another agency (the responsible agency), the Accredited FOI Officers from the former agency will need to identify which FOI applications will be affected.

The former agency should contact the responsible agency and make arrangements for the completion of any outstanding FOI applications. If possible, this should be done before the administrative changes come into effect.

¹ State Records defines a function in this context as "the administrative responsibility, staff and other resources for the implementation of specific government policy and programs".

1.1 – Outstanding FOI applications

Where a function is being transferred, all active and overdue FOI applications should be transferred to the responsible agency to continue processing.

Where applications are almost complete or are complex in nature, it may be more practical for the former agency to finish processing the FOI requests. This should only be done with the agreement of the responsible agency. However, regardless of which agency progresses the FOI application, the final determination can only be made by an Accredited FOI Officer appointed by the Principal Officer in the responsible agency.

Where the former agency agrees to complete outstanding FOI applications, it is advisable that it keeps the responsible agency informed of the progress of the applications. This is important in case an extension of time to complete an application is necessary. Only the Principal Officer of the responsible agency can grant an extension. If the FOI applicant were to lodge an internal review, it will be that Principal Officer that must also complete the internal review.

Once the former agency has dealt with any outstanding FOI applications, it should send copies of the decision and all relevant records to the responsible agency in accordance with the *Managing Records through Administrative Change Guideline*. It is important the records are transferred in case the applicant lodges an internal or external review.

Both agencies should ensure the actions taken when handling outstanding FOI applications, whether they are completed by the former agency or transferred to the responsible agency, are recorded accordingly for reporting purposes.

1.2 – Designating Accredited FOI Officers

When a function is transferred from one agency to another and relevant FOI staff transfer with the function, valid designations will also transfer with the staff. This means staff designated as Accredited FOI Officers in their former agency in accordance with section 4(1)(b) of the FOI Act will remain accredited. However, since they may be processing requests and making determinations relating to functions they have not previously been involved in, it is advisable that all Accredited FOI Officers seek formal designation from their new Principal Officer as soon as practicable.

It should be noted that these Accredited FOI Officers can no longer process and determine applications on behalf of their former agency. That is, they are no longer Accredited FOI Officers for their former agency.

1.3 – Completed FOI applications

The former agency retains responsibility for completed FOI applications and all relevant files associated with these applications. These files should be closed and the responsible agency should be provided appropriate access rights to these closed files if required. For further information, please refer to steps 5 and 8 of the *Managing Records through Administrative Change Guideline*.

1.4 – Keeping the FOI applicant informed

The responsible agency should inform the relevant applicants of the change in agency (transfer of a function) and provide them with the name and contact details of the Accredited FOI Officer in their agency now dealing with their application. In cases where the former agency retains the responsibility for the incomplete application, it may be advisable to inform the applicant that the former agency will be finalising the request.

1.6 – Amending the Agency’s Information Statement

Once the administrative changes come into effect, the Accredited FOI Officers in both the former and responsible agency should take steps to amend any relevant information they provide the public on how to make FOI applications including agency contact information. The agency’s FOI Information Statement should also be amended to take account of any administrative changes.

1.7 – Exempt agency to assume responsibility of function

Where a function that was subject to the FOI Act is transferred to an exempt agency, consideration should be given to whether making that function exempt by default was an intended consequence. It may be necessary to seek legal advice in order to determine whether the transferred function should assume the exempt status of the responsible agency or whether the exempt status of the responsible agency should be amended. Regardless of the outcome, State Records will require information to satisfy annual reporting requirements.

2 – Newly created agencies

If the Government creates a new agency, the Principal Officer of the new agency will need to ascertain whether or not the agency is subject to the FOI Act.

Section 4 of the FOI Act provides the definition of an agency. If it is not clear whether the new agency is subject to the FOI Act, the Principal Officer should seek legal advice.

2.1 – Designating Accredited FOI Officers

While the Principal Officer of the newly created agency is automatically an Accredited FOI Officer for that agency, it is advisable that they designate at least one Accredited FOI Officer. Accredited FOI Officers are responsible for dealing with FOI applications and making determinations.

To designate a new Accredited FOI Officer, the Principal Officer should do so through an instrument of designation that satisfies section 4(1)(b) of the FOI Act. This section requires Accredited FOI Officers of most State Government agencies to occupy an executive or senior level position in the agency and to have undertaken training approved by the Minister responsible for the FOI Act.

3.1 – Advising State Records

When a new agency is created and it is determined that it is subject to the FOI Act, it is recommended that State Records is advised and provided a general contact, information management contact and FOI contact so that we can ensure our correspondence is sent to the correct people.

3.2 – Creating an Information Statement

Section 9(1a) of the FOI Act requires agencies to publish an up-to-date Information Statement in a manner prescribed by regulation. Regulations under the *FOI (General) Regulations 2002* requires they be published on an agency’s website or in their annual report, or both. However, agencies subject to Premier and Cabinet Circular 13, *Annual Reporting Requirements*, should publish their information statements on their website only.

3 - Defunct agencies

3.1 – Agency ceases to exist, function transferred

Section 8(1) of the FOI Act requires an agency, taking over the function of an agency that ceases to exist, to assume all responsibilities of that former agency.

This means the agency must take on the responsibility of processing, reporting and determining all FOI applications made to the former agency from the date it takes over the function as if it had ‘merged’ with the agency.

3.2 – Agency and function cease to exist

Pursuant to section 8(2), where an agency ceases to exist and no other agency is to take over a function, the responsibilities of the defunct agency will devolve to:

- a) an agency nominated by the Minister administering the FOI Act, or
- b) State Records.

In this case, the relevant Minister should write to the Minister responsible for the FOI Act recommending an agency to be nominated to take responsibility for the records. The Minister, on advice, can accept this recommendation, nominate a different agency or advise that it should devolve to State Records.

4 – When transferring a function to an external entity

4.1 – FOI applications received prior to date of transfer to an external entity

When a function of government is to be transferred to an external entity, former agency remains responsible for processing any FOI received in relation to any information assets created up to the date of transfer.

4.2 – FOI applications received after the date of transfer to an external entity

Where an FOI application is made to the agency after the date of transfer, **but** the information requested was created prior to the transfer occurring, the former agency is responsible for processing the FOI application.

If the FOI applications received requests information created **after** the date of transfer this will not be valid under the FOI Act unless the external entity is captured under the definition of ‘agency’ under section 4 of the FOI Act.

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